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No.

In The

Supreme Court of the United States

October Term, 1998

MT. HOPE ASPHALT CORP. a/k/a MOUNT HOPE ASPHALT CORP. and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

vs.

MICHAEL ZAGATA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a state prohibition against the recycling in state of petroleum-contaminated soil from out of state constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United State Constitution.

II. Whether a state prohibition against the recycling in state of petroleum-contaminated soil from out of state, applied to respondents but not to their competitors, constitutes a violation of the Equal Protection Clause of the United State Constitution.

PARTIES TO THE PROCEEDING

Petitioner Mt. Hope Asphalt Corp. has no parent or subsidiary corporations.

Petitioner Barbara Petrosky is the widow of Frank Petrosky, formerly the President of Mt. Hope Asphalt Corp. and a party hereto, and participates in this proceeding as the Executrix of his estate.

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INTRODUCTION

Petitioners, Mt. Hope Asphalt Corp. and Barbara Petrosky, Executrix of the Estate of Frank Petrosky, respectfully request that a writ of certiorari be issued to review the decision and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered in this case. (For the convenience of the Court, both petitioners will hereinafter be referred to collectively as "Mt. Hope.")

OPINIONS BELOW

The decision and judgment of the Supreme Court, Appellate Division, Second Judicial Department of the State of New York, was rendered on March 16, 1998. That decision is reported at 669 N.Y.S. 2d 874 (2d Dep't 1998) and appears at page 1a in the Appendix to this petition. ("Pet. App.".) The decision of the Court of Appeals of the State of New York denying Mt. Hope's motion for leave to appeal, rendered on July 9, 1998, is reported at 1998 N.Y. Lexis 2261, and is reproduced at Pet. App., page 124a.

The June 6, 1996 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Nassau, which transferred the proceeding to the Appellate Division, Second Department, is unreported and is reproduced at Pet. App., page 5a.

The determination of Respondent, New York State Department of Environmental Conservation, which is the object of review in these proceedings, was rendered on September 7, 1995, is unreported and is reproduced at Pet. App., page 112a.

STATEMENT OF JURISDICTION

The decision and judgment of the Supreme Court, Appellate Division, Second Department of the State of New York, was

issued on March 16, 1998. An order denying petitioners' timely motion for leave to appeal was issued by the Court of Appeals of the State of New York on July 9, 1998. The time within which to file this petition extends to October 7, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution reads in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

U.S. Const., art. I, § 8, cl. 3.

The Equal Protection Clause of the 14th Amendment of the United States Constitution reads in pertinent part:

> No state shall deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV.

The Resource Recovery and Conservation Act (RCRA) provides in pertinent part:

> The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . promoting a national research and development program for improved solid waste management and

> resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues.

42 U.S.C. § 6902(a)(9).

STATEMENT OF THE CASE

The fundamental issues presented to the Court for determination in this case deal with the innovative recycling process of utilizing petroleum-contaminated soil in the production of asphalt, and the ban by the State of New York on Mt. Hope's utilization of petroleum-contaminated soil from beyond the borders of New York State. This prohibition burdens interstate commerce in an unconstitutional manner. Moreover, New York State's allowance of Mt. Hope's competitors to utilize out-of-state contaminated soil in their asphalt process constitutes unequal treatment of Mt. Hope in violation of the Equal Protection Clause of the Fourteenth Amendment.

To understand the context in which these issues arise in this case, a brief description of the development of the recycling process and the proceedings below is necessary.

A. The Recycling Of Petroleum-Contaminated Soil

In 1976, Congress enacted the Resource Conservation and Recovery Act — "the comprehensive federal statute regulating waste, 'to reduce the amount of waste and unsalvageable materials.' " Philip Weinberg, *Congress, the Courts, and Solid Waste Transport: Good Fences Don't Always Make Good Neighbors*, 25 Envtl. L. 57, 58 (1995) (quoting Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4)).

It was the first federal statute to declare the recycling of wastes as a paramount public policy. Similarly, the State of New York in 1972 adopted a strong public policy in favor of recycling (ECL 3-0301) and today there is widespread public support of waste recycling wherever feasible. Working with New York State Department of Conservation, Mt. Hope developed a process to utilize petroleum (*e.g.*, gasoline) contaminated soil in the manufacture of asphalt for roads and highways. The proliferation of leaking gasoline tanks throughout the country has created a national crisis, and use of the gasoline-contaminated soil in the manufacture of useable asphalt enabled Mt. Hope and the State of New York to take a hazardous waste and recycle it into a useable product.

In and around 1990 the DEC and petitioners jointly assessed the feasibility of this new recycling process and jointly conducted tests to determine its feasibility. In 1991, petitioners' facility was modified with the approval of New York State in order to recycle petroleum-contaminated soil, and operations were undertaken in late 1991. From August 1991 to September 1992, Mt. Hope worked with the State of New York in making this new process functional. In June of 1992, the State of New York advised Mt. Hope that it was prohibited by the State from transporting petroleum-contaminated soil from New Jersey into New York and from utilizing out-of-state materials in its asphalt production. (While this alleged prohibition was contested by Mt. Hope, it has been upheld by the decision of the New York State Department of Environmental Conservation, and affirmed by the Court decisions below. As a result, Mt. Hope has proceeded here on the basis that it had at all times been prohibited by New York State from utilizing out-of-state contaminated soil in its in-state asphalt manufacturing process.)

Mt. Hope did utilize many tons of petroleum-contaminated soil emanating from New Jersey on at least 36 occasions, for

which the Department has revoked its permit to operate its asphalt plant. The Department concluded that these 36 shipments of contaminated soils from New Jersey to Mt. Hope's Long Island plant, and their subsequent utilization in the asphalt manufacturing process, constituted violations of the New York State Environmental Conservation Law Articles 19 and 27, and 6 NYCRR Part 360. The Administrative Law Judge, after a two-week trial, concluded that in 35 of the 36 occasions when Mt. Hope received New Jersey petroleum-contaminated soil, the material received was of the same "kind and quality authorized to be processed at the facility but for the fact the material originated in New Jersey, rather than New York." (Pet. App., page 96a.)

In addition, Mt. Hope proffered evidence at the hearing that the State of New York had approved a request from one of Mt. Hope's competitors to utilize out-of-state petroleum-contaminated soil in its asphalt manufacturing process, while such use was simultaneously denied to Mt. Hope. While the evidence was not received by the Administrative Law Judge, the Respondent State of New York has conceded the point. (Respondents Brief in the Appellate Division, p. 40.)

As will be seen from a description of the proceedings which took place below, neither the New York State Department of Environmental Conservation, nor the Supreme Court of Nassau County, nor the Appellate Division, Second Judicial Department, nor the New York State Court of Appeals addressed Mt. Hope's claims that the actions of the State of New York had violated its rights under the Commerce Clause and the Equal Protection Clause (except possibly for the statement at the conclusion of the decision of the Appellate Division that "we have reviewed the petitioners' remaining contentions and find them to be without merit").

B. The Proceedings Below

After a two-week trial addressing Mt. Hope's alleged violations of its permit restrictions regarding "foreign" soil, the New York State Department of Environmental Conservation revoked Mt. Hope's permit to operate its asphalt plant, principally because of its use of contaminated soil which originated in New Jersey, purportedly in violation of the requirements of the State of New York and Mt. Hope's permit. Mt. Hope has not operated since 1992. The New York State Department of Environmental Conservation did not address Mt. Hope's constitutional claims, although they were made part of the record. In seeking judicial review of this determination of the New York State Department of Environmental Conservation, Mt. Hope asked the Supreme Court, Nassau County, to set it aside, *inter alia*, because of New York State's unconstitutional discrimination against interstate commerce and its unconstitutional treatment of Mt. Hope. The lower court transferred the proceeding directly to the Appellate Division, Second Judicial Department, which upheld New York State's determination, without addressing specifically either of Mt. Hope's constitutional issues.

The Court of Appeals declined to hear an appeal from the Appellate Division.[1] As noted, none of the three Courts which reviewed this matter below addressed Mt. Hope's constitutional claims on their merits. Because these constitutional issues are serious and substantial, because they implicate the national societal goal of recycling in a deleterious manner, and because Mt. Hope has not yet received an airing of its constitutional grievances, it is respectfully submitted that the issues should be addressed by this Court.

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1. This is the same procedure that resulted in the United States Supreme Court's invalidation of a New York flow control ordinance: *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994).

REASONS FOR GRANTING THE WRIT

This case presents an issue that has divided the lower courts for the last twenty years: the extent to which a state, consistent with the Commerce Clause, may properly restrict or prohibit the importation of contaminated materials across its borders. Because the contaminated material in this case was being recycled into a useable product, its ban has societal implications in addition to constitutional ones.

New York State limited Mt. Hope to using "New York" petroleum-contaminated soil in its asphalt manufacturing process, banning the importation of "New Jersey" contaminated soil of identical composition. The effect was to prevent generators of waste in New Jersey, including the United States Government, from benefiting from Mt. Hope's innovative recycling process, while at the same time reducing Mt. Hope's ability to keep its recycling process functioning. The only alternative to recycling is the disposal of the waste at a costly hazardous waste disposal site, thereby dramatically increasing the cost of disposal and at the same time creating an additional environmental problem.

After barring Mt. Hope from importing petroleum-contaminated soil from New Jersey, the State of New York authorized one of Mt. Hope's competitors to import and utilize such "New Jersey" soil, thereby violating Mt. Hope's rights under the Fourteenth Amendment of the United States Constitution to equal protection of the law.

For all of these reasons, and particularly because the states and the lower courts need guidance on the constitutionality of such import bans, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

I.

AS WITH FLOW CONTROL LAWS, STATE REGULATION OF THE IMPORTATION OF ENVIRONMENTALLY SENSITIVE MATERIAL HAS RECEIVED UNEVEN TREATMENT FROM THE LOWER COURTS, IS OF NATIONAL IMPORTANCE AND SHOULD BE ADDRESSED BY THE COURT.

Just as with flow control laws prior to and even subsequent to this Court's decision in *C. & A. Carbone v. Town of Clarkstown*, the lower courts have continued to grapple with the issue of whether and under what circumstances states may discriminate against environmentally sensitive material such as petroleum-contaminated soil generated beyond its borders.

The dormant Commerce Clause has been construed as the constitutional "restrict[ion on] the states (or their subdivisions) from either unduly burdening interstate commerce or discriminating against it." Weinberg, *supra* at 59. However, for purposes of *stare decisis*, a review of the relevant case law does not provide states or their citizens with a facile way of distinguishing between measures which are legitimate exercises of a state's police power, those which result in only "incidental" burdens on interstate commerce, and those which are *per se* invalid. In spite of a line of cases which holds that importation bans without justification violate the Commerce Clause, the test to be applied remains unsettled. Because a court's characterization of a challenged regulation dictates the level of judicial scrutiny to be employed, and because in the absence of established criteria there is substantial disagreement among the courts as to the process of characterization, guidelines from this Court would further the principle of *stare decisis* by providing definite, fixed, settled standards on which states could rely.

A. Test for Violation of the Commerce Clause.

The test employed was established by this Court in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727 (1979). As set forth by the Court, analysis of a state policy alleged to violate the Commerce Clause requires inquiry as to

> (1) whether the challenged [policy] . . . regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the [policy] . . . serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

See Weinberg, *supra* at 59 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Statutes which only incidentally impact interstate commerce will be upheld "unless the burden imposed . . . is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree." *Id.* at 60 n.15 (citing a similar test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970)). As illustrated, there is considerable ambiguity as to whether discriminatory environmental measures are *per se* invalid or merely have "incidental" impact; whether local environmental protectionism justifies discriminatory measures which restrict interstate import or export of waste; and what level of judicial scrutiny is warranted.

B. Per Se Invalidity.

In *Carbone*, the Supreme Court struck down a ban on the export of waste and held that

> discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has *no other means* to advance a legitimate local interest.

511 U.S. 383, 392, 114 S. Ct. 1677, 1683 (1994) (citations omitted) (emphasis added).

Similarly, in *SSC Corp. v. Town of Smithtown*, the Second Circuit Court of Appeals struck down an ordinance which required that all garbage generated within the town be disposed of at the town incinerator, citing *City of Philadelphia*'s "virtual per se rule of invalidity" of state regulations that discriminate against interstate commerce. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509 (2d Cir. 1995) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535 (1978)).

C. *Pike*'s Balancing Test.

Alternatively, some jurisdictions subject regulations which affirmatively discriminate against interstate commerce to "heightened," rather than "rigorous," scrutiny. The burden of proof is placed on the defendant to establish that "there are no feasible nondiscriminatory alternatives to meet the legitimate state purposes." *Atlantic Coast Demolition v. Chosen Freeholders*, 931 F. Supp. 341, 354 (D.N.J. 1996).

In applying this standard in a situation strikingly similar to Mt. Hope's, the court in *In re Southeast Arkansas Landfill, Inc.*, 981 F.2d 372 (8th Cir. 1992), found that the state had not demonstrated that out-of-state waste was more harmful than in-state waste. Balancing *Pike's* consideration of legitimate state interests, the court struck down the state regulatory scheme because the burden on interstate commerce "was clearly

excessive in relation to putative local benefits." This decision reversed a lower court's determination that, although the importing of out-of-state waste was restricted, the regulatory scheme served a legitimate purpose of protecting the environment. *In re Southeast Arkansas Landfill, Inc.*, 137 B.R. 735 (E.D. Ark. 1992).

Similarly, in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566, (D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994), the court determined that, in spite of a legitimate local purpose, an ordinance's requirement that all out-of-state disposals be reported had a practical discriminatory effect on interstate commerce and hence violated the Commerce Clause.

Furthermore, the Second Circuit found no violation of the Commerce Clause based on a rational relationship between the law and the state's interest. In *New York State Trawlers Association v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994), the court held that a law which prohibited trawlers from taking lobsters from Long Island Sound did not violate the Commerce Clause because it did not discriminate against non-residents and only imposed an *incidental burden* on interstate commerce which was "rationally related to advancing a legitimate state interest."

Viewed as parts of a quilt which together should comprise a seamless whole, it appears that the lower courts are confused as to the proper standard to be applied in evaluating the constitutionality of state laws and policies regulating or banning the importation of environmentally sensitive material. Guidance from this Court will help the lower courts address this national societal concern.

II.

POLICIES SUCH AS NEW YORK'S BANNING THE IMPORTATION OF PETROLEUM-CONTAMINATED SOIL FROM OUT OF STATE BURDEN AND DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Mt. Hope was found to have violated the state-imposed conditions of its permit to recycle petroleum-contaminated soil when over a 10-month period and on 36 separate occasions it received and processed petroleum-contaminated soil from New Jersey. Was it because this soil was different or more dangerous or less controlled than identical material originating in New York? No.

The ALJ found that on practically every occasion when Mt. Hope received New Jersey petroleum-contaminated soil, the material received was of the same "kind and quality authorized to be processed at the facility but for the fact that material originated in New Jersey, rather than New York." (Pet. App., page 96a.)

There are no findings by the Department that Mt. Hope undertook *any* acts which endangered the environment or in any way circumvented the technical procedures set forth in its Permit for accepting petroleum-contaminated soil or processing that soil. Because of the lack of any environmental impact from Mt. Hope's receiving and properly processing this material, the ALJ viewed these violations to be "*de minimis*." (Pet. App., pages 96a-97a.)

It is respectfully submitted that New York State's policy which barred Mt. Hope from importing petroleum-contaminated soil from the State of New Jersey, while at the same time identical to that which it received and processed from within

the State of New York, constitutes a burden upon interstate commerce and a *per se* violation of the Commerce Clause.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have [p]ower . . . [t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. 1 § 8, cl. 3. When read literally, it consists of an affirmative grant of power to Congress. This Court, however, has long interpreted the Commerce Clause "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. at 326, 99 S. Ct. 1727 (1979).

The Commerce Clause "directly limits the powers of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992). "Discrimination" is defined by the Court as the

> differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid (citation omitted).

Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994). This "negative" or "dormant" component of the Commerce Clause is designed to "prohibit economic protectionism" by states (*Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992), and to "foster the development of a unified national market." *SSC Corp. v. Town of Smithtown*, 66 F.3d at 509.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 97 S. Ct. 2434, 2446 (1977),

this Court stated that "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. at 337, 99 S. Ct. at 1737.

On a number of occasions, the Court has considered state "bans" on the importation of "articles of commerce" from other states. In almost every instance, the Court has struck down such bans on the ground that they violate the Commerce Clause.

For example, in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978), the New Jersey Legislature had enacted a statute which banned the importation of out-of-state waste for disposal at New Jersey landfills. Philadelphia and several other cities which had agreements with operators to dispose of their waste at New Jersey landfills sued the State of New Jersey, alleging that the statute violated the Commerce Clause. This Court struck the New Jersey statute as unconstitutional, holding that "waste" is an "article of commerce" for purposes of analysis under the Commerce Clause. The Court further ruled that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622.

Similarly, waste import restrictions of Michigan's Solid Waste Management Act were held to discriminate against interstate commerce. *Ford Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. Natural Resources*, 504 U.S. 353, 112 S. Ct. 2019 (1992). Michigan claimed that the restrictions were necessary to enable individual counties to make adequate plans

for the safe disposal of future waste. *Id.* at 366, 112 S. Ct. at 2027. However, the Supreme Court ruled that Michigan had failed to provide any legitimate reason for allowing petitioner to accept waste from inside the county but not waste from outside the county. *Id.* at 361, 112 S. Ct. at 2024; *see also, In re Southeast Arkansas Landfill, Inc. v. State of Arkansas, Dep't of Pollution Control & Ecology*, 981 F.2d 372 (8th Cir. 1992).

In *Dennis v. Higgins*, 498 U.S. 439 (1991), this Court held that rights granted under the Interstate Commerce Clause are individual rights enforceable by those injured by state action:

> It is also clear, however, that the Commerce Clause does more than confer power on the Federal Government; it is also a substantive "restriction on permissible state regulation" of interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S. Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240, 81 L.Ed.2d 71 (1984). In addition, individuals injured by the state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. *See*, e.g., *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco Dept. of Business Regulations of Florida*, 496 U.S. 18, 31, 100 S. Ct. 2238, 2247, 100 L.Ed.2d 17 (1990). *Id.* at 447.

Recently, the United States Court of Appeals for the Second Circuit, in *SSC v. Smithtown*, *supra*, struck down an ordinance enacted by the Town of Smithtown which required that all

residential and commercial garbage generated in the Town be disposed of at the incinerator jointly financed by the Town of Smithtown and the Town of Huntington. In its ruling in favor of the plaintiff challenging the regulatory scheme, the Second Circuit stated that state regulations that discriminate against interstate commerce are subject to a "virtual per se rule of invalidity (citations omitted)." *Id.* at 509. *See also*, *C. & A. Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994).

Mt. Hope was the first facility in New York to seek and obtain approval to engage in the environmentally sound concept of taking a waste product — petroleum-contaminated soil — and recycling that waste into a useful product — asphalt. It taught the DEC how this recycling process could work, and soon other asphalt plants had followed Mt. Hope's lead. Demonstrating that the process could be implemented using either "New York" or "foreign" contaminated soil, in 1992 the Department authorized one of Mt. Hope's competitors to receive petroleum-contaminated soil from the State of New Jersey. (See Respondents Brief in the Appellate Division, p. 40.)

It is respectfully submitted that since the Department has authorized one asphalt manufacturer to receive petroleum-contaminated soil from New Jersey, it can hardly claim that there exists a health or other compelling governmental reason to bar Mt. Hope from doing likewise. Since it can thus provide no "demonstrable justification" for such a position, any alleged permit prohibition which precluded Mt. Hope from receiving New Jersey soil constitutes a *per se* discrimination against interstate commerce and, therefore, is invalid under the Commerce Clause of the United States Constitution.

III.

IN ADDITION TO NEW YORK'S VIOLATION OF THE COMMERCE CLAUSE, ITS PROHIBITION AGAINST MT. HOPE RECEIVING SOIL FROM THE STATE OF NEW JERSEY IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court summarized the protection granted under the Equal Protection Clause as follows:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyer v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed. 2d 786 (1982). *Id.* at 439.

Lawrence H. Tribe in his treatise, "American Constitutional Law," *Foundation Press* (1978), states:

> Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent the compelling government justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights. *Id.* at 1002.

In *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865 (1991), the Court held that the Commerce Clause confers upon an individual the right to engage in interstate trade free from restrictive state regulation:

The court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In *Crutcher v. Kentucky*, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated:

> To carry on interstate commerce is not a franchise or privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.

Id. at 57. Similarly, *Western Union Telegraph Co. v. Kansas, ex rel. Coleman*, 216 U.S. 1, 26, 30 S.Ct. 190, 1907, 54 L.Ed. 355 (1910), referred to the "substantial rights of those engaged in interstate commerce." And *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed. 2nd 562 (1967) declared that engaging in interstate commerce is "a righ[t] of constitutional stature." *Id.* at 448.

Based upon the foregoing, it is respectfully submitted that the unequal treatment by a state in affording one company the right to engage in interstate commerce while depriving a similarly situated company from engaging in the very same interstate commerce constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, unless the state can demonstrate a *compelling* reason for the discrimination. No such compelling reason has been shown here.

Although respondents concede that New York has permitted a competitor of Mt. Hope to utilize "New Jersey"

soil while Mt. Hope has been shut down because it processed the same soil, respondents claim that this divergent treatment does not constitute a violation of the Equal Protection Clause of the United States Constitution.

Realizing the weakness of their position that no discrimination occurred, respondents assert that if the Court finds a discriminatory act, it should apply the "rational basis test," rather than the "strict scrutiny test" in analyzing whether New York has violated Mt. Hope's Equal Protection Clause rights. To the contrary, Mt. Hope relies upon Professor Tribe's analysis and this Court's decision in *Dennis v. Higgins*, *supra*, in asserting that its right to engage in interstate commerce is a "fundamental right" under the United States Constitution, the deprivation of which under Equal Protection jurisprudence gives rise to the use of the "strict scrutiny test" and not the "rational basis test" as suggested by respondents. Application of the "strict scrutiny test" mandates that petitioners' equal protection rights have been violated.

However, even if this court were to apply the "rational basis test," the result would be the same. Respondents rely on their "myth of DEC spill numbers" to establish that they acted reasonably. As this myth is not supported by the record, respondents are left without a rational basis for their discriminatory treatment of Mt. Hope. Based upon the foregoing, it is respectfully submitted that New York's ban on Mt. Hope's use of "foreign" contaminated soil, when others similarly situated are allowed to utilize such "foreign soil," constitutes a violation of the Equal Protection Clause of the United States Constitution and should be rectified by this Court.

CONCLUSION

This case presents a question of significant national importance — whether and under what conditions a state may ban the importation of environmentally sensitive material intended for recycling into a useable product, as well as the corollary question of whether a prohibition to one citizen can be justified in light of a grant to a similarly situated citizen.

The flow of environmentally sensitive material across state borders has received heightened attention nationally because of our concern with protection of the environment balanced against our desire to recycle contaminated material. In this case, petitioner has proposed to recycle petroleum-contaminated soil into useable asphalt, utilizing soil originating from within New York State as well as from without, and the State has prevented it from doing so. This type of state action clearly implicates the Commerce Clause and the Equal Protection Clause of the United States Constitution and presents to this Court the opportunity to provide local governments, the regulated community and the lower courts with appropriate guidelines to foster both societal goals — protection of the environment and encouragement of recycling — all within a constitutional framework.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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